No. 86-1750

In The

Supreme Court of the United States

October Term, 1986

SOUTHERN METHODIST UNIVERSITY,

Petitioner,

v.

CAROLE KNEELAND, BELO BROADCASTING CORPORATION, A. H. BELO CORPORATION, DAVID EDEN, TIMES HERALD PRINTING COMPANY, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SOUTHWEST ATHLETIC CONFERENCE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

COUNSEL OF RECORD:
JAMES R. RAUP
JACK BALAGIA, JR.
McGINNIS, LOCHRIDGE & KILGORE
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

Attorneys for Respondents Carole Kneeland and Belo Broadcasting Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION RESTATED

Whether the Fifth Circuit Court of Appeals erred in affirming the district court's denial of intervention as of right.

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Respondents Carole Kneeland (Kneeland) and Belo Broadcasting Corporation (Belo) respectfully request that this Court deny the petition for writ of certiorari for the reasons stated below.

STATEMENT OF JURISDICTION

Respondents Kneeland and Belo do not dispute the jurisdiction of this Court.

STATEMENT OF THE CASE

This is an intervention case in which Petitioner Southern Methodist University (SMU) unsuccessfully sought to intervene in litigation primarily involving construction of the Texas Open Records Act. The district court denied Petitioner's motions for leave to intervene on the ground that Petitioner was adequately represented by the existing Defendants. The Fifth Circuit Court of Appeals affirmed this decision in *Kneeland v. National Collegiate Athletic Association,* 806 F.2d 1285 (5th Cir. 1987). Petitioner's statement of the case contains misstatements concerning Respondents Kneeland and Belo Broadcasting Corporation. Respondents did not make any request of Petitioner under the Open Records Act, and they did not file suit against SMU in Texas state court. Most of Petitioner's "statement of the case" contains argument and other misrepresentations and mischaracterizations with which Respondents disagree.

Respondents filed this case under the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a, in Texas state court primarily seeking to establish two issues: that the National Collegiate Athletic Association (NCAA) and the Southwest Conference (SWC) are "governmental bodies," as the Act defines the term, and that the documents collected, assembled and maintained by the NCAA and the SWC as part of their completed investigations of college football recruiting violations are public and subject to disclosure. Respondents sued only the NCAA and the SWC, sought only documents maintained by them as part of their completed investigations, and did not seek any documents from or relief against Petitioner.

Defendants NCAA and SWC removed the case to federal district court, and Petitioner unsuccessfully sought to intervene.

After the district court's denial of Petitioner's first motion for leave to intervene, Petitioner filed in the Fifth Circuit Court of Appeals a motion for stay of all proceedings pending its appeal, which was summarily denied. After an evidentiary hearing on the applicability of the Act to Defendants and the district court's May 15, 1986 order holding that they were subject to the Act, both Defendants moved to certify that order for an immediate appeal, and the SWC moved to vacate that order and to dismiss or remand the state law claims. The district court denied these motions, and the NCAA then filed a petition for writ of mandamus in the Fifth Circuit seeking to compel the district court to certify the May 15 order for an immediate appeal. The Circuit Court denied this petition.

The NCAA and the SWC filed numerous briefs in the district court and the Fifth Circuit Court of Appeals before and immediately after the May 15 order. At each evidentiary hearing in this cause both Defendants introduced documentary evidence, produced witnesses, and argued vigorously that they are not subject to the Act, but if they are, no documents should be disclosed because of the exceptions set out in the Act. At the evidentiary hearing on Defendants' affirmative defenses, the NCAA asserted 36 affirmative defenses and filed a voluminous brief, which the SWC adopted at trial. The SWC also urged numerous affirmative defenses.

Both Defendants extensively briefed the statutory exceptions to the Act and maintained steadfastly that

Texas common law, the exceptions to the Act, and the state and federal constitutions prohibited disclosure of any of the documents. The district court agreed that certain exceptions applied but ordered disclosure of the bulk of the information. Both Defendants appealed and have filed lengthy briefs in the Fifth Circuit, contending that the Act does not apply to them, but if it does, it is unconstitutional and the exceptions to the Act prohibit any disclosure. At all stages of this litigation, including appeal, the Defendants, as Texas law allows, have asserted constitutional, common law, and statutory defenses of their member schools and third parties, as well as their own defenses, and they have not yielded an inch in their zealous defense of Respondents' suit.

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REASONS WHY THE WRIT SHOULD BE DENIED

The general considerations for Supreme Court review by writ of certiorari, as set out in Rule 17.1 of the Supreme Court Rules, have not been satisfied in this case. Although Petitioner did not discuss or even mention Rule 17.1, the petition alleges that the decision by the Fifth Circuit Court of Appeals in this case is contrary to Supreme Court decisions and to decisions in other circuits. To demonstrate these "conflicts," Petitioner states that amended Rule 24(a) of the Federal Rules of Civil Procedure places the burden to show inadequacy of representation of a movant applying for intervention on the opponent of intervention, and Petitioner erroneously cites Supreme Court authority and District of Columbia Circuit authority for the proposition that the burden is on the opponent. In the

instant case, Kneeland v. National Collegiate Athletic Association, supra, the Fifth Circuit Court of Appeals held that Petitioner had failed to carry its burden to show inadequacy of representation and affirmed the district court's denial of intervention as of right.

No conflict exists. The United States Supreme Court has placed the burden of demonstrating inadequacy of representation squarely on the applicant for intervention. *Trbovich v. United Mine Workers,* 404 U.S. 528, 539 n.10 (1972). Not surprisingly, all federal circuits follow this rule established by the Supreme Court. 3B *Moore's Federal Practice* § 24.07[4] at 24-71 & n.10. Because the Petitioner and the existing Defendants have the same ultimate objective in the instant case, the Fifth Circuit required the applicant to show adversity of interest, collusion or nonfeasance. *Kneeland v. National Collegiate Athletic Association, supra,* 806 F.2d at 1288. Petitioner did not make such a showing, and the Fifth Circuit affirmed denial of intervention; this holding is not in conflict with decisions of this Court or other circuits. *See* 3B *Moore's Federal Practice* § 24.07[4] at 24-71 & n.11. The requirements of Supreme Court Rule 17.1 have not been satisfied, and the petition for writ of certiorari should be denied on that basis alone.

Equally important, the Fifth Circuit Court of Appeals did not err when it affirmed the district court's denial of Petitioner's motions to intervene. Petitioner made no attempt whatever in the district court to satisfy the requirements of *Bush v. Viterna,* 740 F.2d 350 (5th Cir. 1984), and Petitioner did not even mention *Bush* in its two appeals to the Fifth Circuit. *Bush* correctly states

the law and controls this case. The NCAA and the SWC have the same ultimate objective in *this* litigation: non-disclosure of the documents sought by Respondents through litigation against the NCAA and the SWC under the Texas Open Records Act.

Respondents sought to establish by this litigation that the NCAA and the SWC are "governmental bodies," as the Act defines the term, and that the documents in the possession of the NCAA and the SWC are public and must be disclosed for inspection and copying. Respondents sought only documents maintained by Defendants NCAA and SWC; Respondents sought nothing from Petitioner SMU and no relief against it. Defendants have vigorously opposed disclosure of any of the documents sought by Respondents, as would Petitioner if intervention had been allowed. Because the ultimate objective of Petitioner is identical to that of the existing Defendants, the Court of Appeals did not err when it followed *Bush v. Viterna, supra,* in holding that Petitioner must, and did not, demonstrate "adversity of interest, collusion or nonfeasance."

There are many misrepresentations to this Court in the petition for writ of certiorari, the most significant of which are that Petitioner was inadequately represented in fact and that Petitioner had an adversity of interest with the existing Defendants. The NCAA and the SWC zealously represented themselves, their member schools, and any individuals who may be connected with the documents at issue in this cause, as they are entitled to do under Texas law construing the Open Records Act. *Industrial Foundation of the South v. Texas Industrial Accident Board,* 540 S.W.2d 668 (Tex. 1976), *cert. denied,* 430 U.S. 931 (1977).

They challenged the constitutionality of the Act as applied to them or to others, its applicability to them under Texas law, and they sought to protect the privacy and other rights of their member schools and third parties. The NCAA raised 36 affirmative defenses, the SWC raised numerous defenses as well, and it must be remembered that Petitioner is a member of both associations and was represented by both in this litigation.

The existing Defendants in this litigation, through numerous and voluminous briefs and through evidence and argument of counsel, made all the arguments Petitioner would make and raised many defenses Petitioner did not raise in its counterclaim filed in this cause. Representation of Petitioner's interests by Defendants has been aggressive and zealous throughout this litigation with no hint of compromise, and is continuing as they appeal the merits of the case to the Fifth Circuit. Petitioner seems to say that it could have done better, but this second-guessing is not sufficient grounds for intervention as of right.

Petitioner also contends that it has a conflict of interest because it is "the regulated" and the existing Defendants are "the regulators." The cases it cites for this proposition are inapposite. In those cases there was an inherent or statutory conflict *in the same litigation* in which the applicant sought to intervene. *E.g., Trbovich v. United Mine Workers, supra.* There is no such conflict in *this* case; both Defendants and Petitioner desperately want to keep secret the documents collected, assembled and maintained by Defendants, either by disputing the applicability of the Act to Defendants or by applying the

exceptions set out in the Act. The possibility that there may be some conflict between Petitioner and one or both Defendants in some past or future proceeding is not relevant to intervention in *this* litigation. *Bush v. Viterna, supra,* 740 F.2d at 356-57. Petitioner did not demonstrate below and does not demonstrate here that it is entitled to intervene as of right.[1]

CONCLUSION

The petition for writ of certiorari attempts to manufacture a conflict where none exists between the decision below and decisions of this Court or other circuits. In *Kneeland v. National Collegiate Athletic Association, supra,* the Fifth Circuit merely reaffirmed the settled requirement that an applicant for intervention under Rule 24(a) must meet a minimal burden of showing inadequacy of representation. Petitioner seeks to write this requirement out of the rule, but the Fifth Circuit Court of Appeals correctly affirmed the district court's denial of intervention as of right. This case presents no conflict and no important

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[1] Petitioner's contention that it was entitled to an evidentiary hearing is frivolous. The requirement of an evidentiary hearing is a Fifth Circuit requirement which is unique to motions to intervene in school desegregation cases. *Kneeland v. National Collegiate Athletic Association, supra,* 806 F.2d at 1289 and cases cited therein.

federal issues which should be decided by this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

McGinnis, Lochridge & Kilgore
Jack Balagia, Jr.
James R. Raup
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

James R. Raup
State Bar No. 16584200

Attorneys for Respondents
Carole Kneeland and
Belo Broadcasting Corporation